***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

# 76-7217

ORIGINAL

*To be argued by*
D. DAVID COHEN

In The

## United States Court of Appeals

For The Second Circuit

COMMERCE TANKERS CORPORATION,
*Defendant-Counterclaimant-Appellant,*
and
VANTAGE STEAMSHIP CORPORATION,
*Intervening Defendant-Appellant,*
*vs.*
NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
*Plaintiff-Appellee.*

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VANTAGE STEAMSHIP CORPORATION,
*Plaintiff-Appellant,*
*vs.*
NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
*Defendant-Appellee.*

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# REPLY BRIEF FOR DEFENDANT-COUNTERCLAIMANT-APPELLANT

UNITED STATES COURT OF APPEALS
FILED
SEP 15 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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(9722) LUTZ APPELLATE PRINTERS, INC
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

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In The

# United States Court of Appeals

For The Second Circuit

COMMERCE TANKERS CORPORATION,

*Defendant-Appellant,*

*vs.*

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

*Plaintiff-Appellee.*

*On Appeal from the United States District Court for the Southern District of New York*

## REPLY BRIEF FOR DEFENDANT-APPELLANT COMMERCE TANKERS CORPORATION

This is an appeal from a determination by the District Court (Hon. Thomas P. Griesa) limiting appellant Commerce Tankers Corporation's ("Commerce") damages against appellee National Maritime Union of America, AFL-CIO ("NMU") to $10,000, the amount of an injunction bond posted by the NMU when it sought and obtained an arbitral award and erroneous order of preliminary injunction enforcing an NMU contractual clause which restrained Commerce from selling a United States flag tanker to appellant Vantage Steamship Corp. ("Vantage") for $2,750,000.

In its initial brief, Commerce urged reversal of the judgment below for the following reasons:

FIRST: The NMU's restraint-on-transfer[1] and related agreements constituted a group boycott proven to be in violation of the antitrust laws, and the NMU's conduct in obtaining and enforcing the group boycott directly caused Commerce's damages and could not be excused by an erroneous order of preliminary injunction, requiring temporary compliance therewith;

SECOND: Limitation of Commerce's relief to the amount of the injunction bond was:

(a) based upon case law:

(i) not expressly incorporated in Rule 65(c) of the Federal Rules of Civil Procedure ("FRCP");

(ii) not supported by governing precedent in this Circuit; and

(iii) recently rejected by the Third Circuit Court of Appeals;

(b) an unconstitutional deprivation of Commerce's right to due process of law under the peculiar circumstances of this case.

THIRD: Judgment in favor of Commerce without regard to the amount of the bond was also required by Commerce's cause of action against the NMU under Sections 301 and 303 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§185, 187.

In its brief filed August 30, 1976, the NMU urges affirmance of the judgment of the District Court. This reply

1. Article I, Section 2 of the 1969 NMU Collective Bargaining Agreements (E24).

brief is intended to be responsive to the arguments and authorities cited by the NMU and, perhaps more importantly, to emphasize the Union's utter and complete failure to meet or refute numerous contentions of Commerce and Vantage relevant to determination of the appeal.

## ARGUMENT

### POINT I

### THE NMU HAS FAILED TO ANSWER NUMEROUS POINTS CRITICAL TO DETERMINATION OF THE APPEAL.

1. In Commerce's brief (p. 21) Commerce stated:

> "No cognizable reason in law has ever been advanced as to why the oral agreement made by the NMU with Mr. Silver on behalf of the MSC/TSC companies not to transfer their vessels to competitors in the coastwise trade is not a *per se* illegal group boycott, and certainly none is contained in the District Court's opinion."

The NMU does not meet that argument or otherwise attempt in any way to distinguish the governing authority of *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local No. 100,* 421 U.S. 616 (1975) ("Connell").

2. In Commerce's brief (p. 23), Commerce demonstrated that:

> "On the uncontested evidence, it was Mr. Silver's actual understanding that the NMU would require all of its contracted employers to participate in the industry-wide funding scheme. If independent company participation in the

> funding could be terminated by the simple device of transfer of vessels to non-NMU contracted companies, then the scheme would obviously fail. Although Mr. Silver denied that this was discussed, the only real choice independents were permitted under the 1969 NMU agreements was to scrap their vessels or transfer them foreign in either event out of the coastwise trade. Many, many vessels were transferred out of the coastwise market (E69 *et seq.*). Practically all of the vessels so disposed of were of the same vintage (post-World War II more than 20 years old) as the BARBARA. Whatever the motives of the MSC/TSC and the NMU may have been, one thing is for certain: they certainly succeeded in establishing conditions ruinous to the business of the independent operators."

When a union agrees with one set of employers to impose terms and conditions on other employers, it forfeits its antitrust exemption. *Ramsey v. United Mine Workers,* 401 U.S. 302, 313 (1971); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965). Ignoring the documentary evidence that proved that the NMU did reach such an extra-unit agreement with the MSC/TSC employers is no answer to this legal issue. Yet, that is exactly what the District Court did, and the NMU brief does not deny or refute it.

3. In Commerce's brief (p. 25) it was asserted that the proven background factors ". . . though not required for proof of Commerce's *per se* antitrust claims, are relevant to determining the overall circumstances impacting on the arrangement." The NMU does not deny or refute the facts shown to be the historical genesis of the restraint-on-transfer clause.[2]

2. See Commerce's brief, section: The Genesis of the Restraint-on-Transfer Provisions (pp. 4-9).

4. In Commerce's brief (p. 43) Supreme Court authority[3] was relied on for the proposition that the Union's securing of *specific enforcement* of a secondary boycott provision *void* under Section 8(e), 29 U.S.C. §158(e), is actionable in damages under the provisions of either or both of the labor laws or the antitrust laws. The NMU brief does not meet or distinguish this authority or in any way explain the District Court's failure to do so.

5. In Commerce's brief, it was asserted that "there was ample evidence to find that implicit threats of strike or other labor strife actually prevented a commercial resolution of the controversy" on February 6, 1971 (p. 44); and that Commerce had asserted breach-of-contract claims under Section 301, LMRA, 29 U.S.C. §185, minimally worthy of an explained determination by the Court (pp. 44-45). The NMU simply ignores these arguments.

## POINT II

## THE DISTRICT COURT ERRED ON THE FACTS AND ON THE LAW WHEN IT FOUND THAT THE INJUNCTION WAS THE PROXIMATE CAUSE OF THE DAMAGE.

The finding on which the NMU relies for its entire defense in this appeal is the determination by the District Court that the "proximate cause of the delay and final frustration of the S.S. BARBARA transactions was the preliminary injunction issued by Judge Frankel" (1432a). Commerce's brief (pp. 26-29) contended that in making this determination, the District Court erred on the facts and on the law. Commerce cited four ways in which other aspects of the unlawful NMU combinations impacted on the ship sales market during the pendency of the

3. *Connell, supra,* 421 U.S. at 645-50, fn. 9 (Stewart J. dissenting). Commerce suggests that a close reading of *Connell* indicates that all nine Justices would find the NMU restraint-on-transfer clause to be actionable under the antitrust and/or labor laws.

injunction[4] (p. 26). The NMU does not meet or refute that evidence in any way whatsoever other than to label the Court's one-sentence, no-authority holding as "the most obvious fact in the entire case." If it is so obvious, why is it indefensible?

On the "law" side of the issue of proximate cause, the NMU urges a theory not adopted by the District Court, although urged on it that "tort principles[5] of causation cannot be applied where the conduct in question is resort to the courts for the determination and enforcement of rights" (NMU brief, p. 13). The NMU then cites a series of cases which, in following the holding of *Eastern Railroad Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 125 (1961), stand for the principle that joint efforts to influence public officials, administrative agencies, and courts, are not violative of the antitrust laws. In each of the cases cited, the only conduct alleged to be unlawful was the joint understanding to use established public channels for adjusting grievances. Commerce has no quarrel with the *Noerr* doctrine, but rather contends that it is clearly inapplicable here where the conduct challenged was the understandings between the NMU and the supervisory unions, on the one hand, and MSC/TSC employers, on the other hand, which restrained trade by precluding transfer of vessels and by binding unconsenting parties to an industry-wide pooling of pension obligations. If every agreement unlawful under the antitrust laws becomes non-actionable in the absence of specific proof that it was enforced otherwise than by resort to court[6] then the loophole this case will engrave on our nation's antitrust laws far exceeds in importance the question of whether the steamship companies may have recovery against the NMU.

4. Additionally, as Vantage's brief (pp. 13-14) points out: after the injunction issued, Vantage attempted to purchase other vessels in order to fulfill the SoCal Charter. The inability of other NMU owners — not bound by the injunction — to deal with Vantage clearly complicated Commerce's problem as well.

5. If ordinary principles of causation cannot be applied, what principles did the District Court apply?

6. In fact, the evidence demonstrated that the MSC/TSC employers voluntarily adhered to the unlawful combination. The NMU's "resort to court" argument relates only to the action it took against Commerce and Vantage.

## POINT III

## THE DISTRICT COURT ERRED IN LIMITING COMMERCE'S RECOVERY AGAINST THE NMU TO THE AMOUNT OF THE INJUNCTION BOND.

The NMU asserts that there is "massive authority supporting the injunction bond rule" (NMU brief, p. 18). Commerce agrees. The points of disagreement presented by this appeal are:

> (i) Is such authority well founded in light of the language of Rule 65(c), by which Congress provided for a bond as "security" for injunctive relief?
>
> (ii) Has this Court previously adopted the rule that the amount of the bond operates as a limitation on recovery[7] and whether or not it has, should the rule be adhered to now in the light of its potential for inequity and dubious historical origin; and
>
> (iii) Whether, under the *peculiar facts of this case*, imposition of the injunction bond limitation deprives Commerce of its constitutional right to procedural due process?

None of these issues is resolved by admonitions that the rule has been "concurred in by some of the most distinguished jurists in our country's history" (NMU brief, p. 23). Some of our most distinguished jurists enforced laws of racial segregation until evidence of the inequities of that system caused equally distinguished jurists to take a fresh look at the origin and

7. As Vantage's brief (pp. 12-13) points out: "The *damnum absque injuria* approach has traditionally been defended as appropriate in assessing plaintiff's blame on the grounds plaintiff has committed no separate wrongful action. *This is not the case here.* Here, the NMU obtained the injunction based on and in furtherance of its own illegal actions in violation of the antitrust laws, and the *damnum absque injuria* approach is consequently inappropriate." The NMU brief does not meet or refute this point.

constitutionality of the challenged practices.[8] This is not forbidden by the law; rather, it is implicit in the judicial process and the reason why each new controversy is permitted its day in court.[9]

Clearly, this private litigation does not have a compelling public importance, but it does present serious issues arising under the Due Process Clause (Commerce brief, pp. 35-40). The NMU contends that Commerce's Due Process argument is fully answered by this Court's *en banc* decision in *Brault v. Town of Milton*, 527 F.2d 730 (2d Cir. 1975). We strenuously disagree.

In *Brault*, the Town of Milton adopted a zoning ordinance which restricted the plaintiff's use of a parcel of land within the Town. The Town then sued the Braults and secured a temporary injunction enforcing the ordinance. Ultimately, the injunction was vacated because the vote had been taken at an improperly constituted town meeting. 527 F.2d at 732. Although the Braults had apparently suffered actual damages of $86,411 during the pendency of the injunction, the Vermont Supreme Court held that the municipality, as a municipality, was immune from liability except to the extent that it waived such immunity by filing a $500 injunction bond, and accordingly so allowed the plaintiffs' recovery to the extent of the bond. See *Town of*

8. At the District Court, the NMU contended that it would be unfairly prejudiced by a change in law since it had relied upon the injunction bond rule in securing the injunction. Commerce countered by stating that if the Union knew of the bond limitation rule and had intentionally neglected to plead it as a defense (even to the Amended Counterclaims filed in 1974) the Union ought, by reason of laches, be precluded from asserting any such defense of limitation at trial. Union counsel have never come forward to inform the courts when they first "assumed" that the "price" of the injunction and therefore the limit of the Union's liability was the amount of the bond; and why, if that assumption dates back to 1971 it was *never* raised before Judges Wyatt, Frankel and/or Croake, and *not* pleaded affirmatively in reply to Commerce's Counterclaims or Amended Counterclaims, although the NMU reply (277-85a) to Commerce's Amended Counterclaims (263-76a) contains fourteen affirmative defenses.

9. The Union's position that courts may "impose preliminary constraints for the benefit of a party before that day and deny ... adequate compensation to the other party if the contraints prove improvidently granted would appear a perversion of the judicial process." Metzger and Friedlander, *The Preliminary Injunctions: Injury Without Remedy*, 29 Business Lawyer 913, 924 (1974).

*Milton v. Brault,* 132 Vt. 377, 320 A.2d 630, 632 (1974). (Thus, in the first instance the *Brault* case does not involve the use of the injunction bond by way of limitation on recovery; but rather by way of creating a mechanism for some liability when otherwise there would have been none. This, Commerce contends, was the true meaning of the original Supreme Court decision in *Russell v. Farley,* 105 U.S. 433 (1881)).

Thereafter, the Braults commenced a federal action asserting that the Town's "wrongful taking" of their property constituted a violation of the Due Process Clause of the Fourteenth Amendment. In this Court, the Braults conceded that the Town had committed no independent wrong, cognizable under any federal statutory or common law theory. 527 F.2d at 738. For the reasons cited *infra,* the majority *en banc* found it unnecessary to decide whether the Fourteenth Amendment could be used as a "sword" to create a constitutionally-based claim where none otherwise exists. *Id.* (This question is in no way posed by Commerce's claims.)

This Court went further, however, to state that the Town's resort to court was the very antithesis of a denial of due process. 527 F.2d at 738. The learned opinion of Judge Mansfield stated:

> "The Court's function is to assure that no party will be deprived of property without satisfying the fundamentals of due process, including the requirement that the defendant be furnished with notice and a statement of the claim against him and the opportunity to prepare and present a defense, a hearing, the right to confront and cross-examine witnesses, and findings. *Groppi v. Leslie,* 404 U.S. 496, 500-501, 92 Sup. Ct. 582, 30 L.Ed. 2d 632 (1972). *It is undisputed that all of these requirements were met* in the Town's suit against the Braults . . .". 527 F.2d at 738-39 (Emphasis Supplied.)

By contrast, in the Kheel arbitration:

(1) the NMU proceeded without any written statement of its claim;

(2) Commerce was denied the opportunity, urgently requested, to prepare and present a defense; and

(3) Commerce was not permitted a hearing to call witnesses or to confront and cross-examine the Union's witnesses. Indeed there were *no* witnesses.

These deficiencies[10] were in no way cured on the NMU's application before Judge Frankel for enforcement of the arbitral award of injunction. Accordingly, it is hard to see how the Union finds comfort in the ***Brault*** decision.

Finally, the opinion in ***Brault*** expressly neglected to decide whether "one damaged as a result of the erroneous issuance of an injunction should be entitled to damages from the person who obtained it" regardless of malice, because the Braults' inability to recover against the Town "did not arise from the Town's injunction suit"[11] but rather from the Town's status as a sovereign and Vermont's adherence to the doctrine of sovereign immunity. 527 F.2d at 740.

Commerce claimed at trial and in its brief (pp. 36-37) that the denial of due process by Arbitrator Kheel was compounded by the manner in which the Union proceeded before Judge Frankel and by the Court's erroneous "assumptions" of fact in the absence of an evidentiary hearing. The NMU (brief, p. 26) contends that this point "is simply false." It is "false," they say, because oral argument was held as to questions of law, and if

10. Judge Frankel termed them "some quibbles about the arbitrator's procedure (96a).

11. In fact, under Vermont statutory law, when an injunction is dissolved in favor of the plaintiff, the defendant is normally permitted to recover "his actual damages caused by the wrongful issuing of the injunction." 12 Vermont Statutes §4447.

there was a factual issue on which Judge Frankel failed to take testimony or other procedural irregularity, such error certainly would have been given immediate attention by this Court on an expedited appeal (NMU brief, p. 26). Perhaps this point is best laid to rest by Vantage's brief (pp. 39-40):

> "The issues involved in Judge Frankel's actions, the rulings on federal law he erroneously made, and any appeal therefrom were the very issues already pending before the NLRB. The interests of judicial economy and efficient judicial resolution of the technical labor law issue raised, argued that any appeal from the Frankel decision be deferred until the NLRB resolved the issue; indeed, if the appeal had been taken, this Court at its own discretion might have followed the same course."

(See also Commerce brief, pp. 14, 39-40; 1463-67a).

The constitutional issue is not only that Judge Frankel made erroneous findings of fact; it is that he was forced to "guess" by the Union's procedural shortcuts and by its insistence on an arbitral award from the arbitrator without a trial. This also the Union defends saying that "insofar as the proceeding before Arbitrator Kheel is concerned, no witnesses were heard because there was nothing on which to hear witnesses or take evidence" (NMU brief, p. 25). Does the Union seriously contend that the proceedings before Judges Wyatt and Frankel would have had the same outcome if the District Court knew:

(a) That the restraint-on-transfer agreements resulted from the private negotiations between the unions and the MSC/TSC employers;

(b) That the NMU restraint-on-transfer agreement was made *orally* only and that as of the time of the proceeding, no employer had signed any contract containing the provision; and

(c) That the restraint-on-transfer agreements were negotiated simultaneously with industry-wide pension funding so that if the BARBARA was transferred to a non-NMU contracted United States flag carrier, the real economic losers, at least so far as the pension funds were concerned, would not have been the seamen, but rather the employers (634-39a).

Commerce respectfully submits that *but for* the denial of due process by Arbitrator Kheel at the insistence of the NMU,[12] there *never* would have been any preliminary injunction issued in this case.

## POINT IV

## THE DISPUTED FINDINGS OF THE DISTRICT COURT ARE CLEARLY ERRONEOUS AND NOT SUPPORTED BY THE RECORD.

The NMU urges that the judgment of the District Court be affirmed on the well-established principle that in a case tried without a jury the factual findings of the trial court "not be set aside unless clearly erroneous." Fed. R. Civ., p. 52(a) (NMU brief, p. 9). The "unless clearly erroneous" doctrine applies only to appellate review of findings of fact; it does not apply to the District Court's conclusions of law.[13] Moore's Federal Practice ¶52.03.

12. Mr. Kheel is permanent arbitrator under the NMU's industry-wide collective bargaining agreements. The NMU demanded arbitration on January 25. Because Commerce's regular counsel was unavailable due to family illness (686-89a), the demand was initially turned over to special counsel and arbitration was fixed for February 8th (349-56a). On the 8th, Commerce promised Arbitrator Kheel that if a 72-hour adjournment was granted, it would not transfer the vessel in the interim (25a, 364a). The NMU, playacting as always, contended that Commerce's promises could not be trusted (25a) and thereby got its permanent arbitrator to give them immediate relief.

13. Findings of "ultimate" facts clearly imply the application of standards of law. *Baumgartner v. United States*, 332 U.S. 665, 671 (1943). *Baumgartner* has been favorably cited in many circuits, including this one. See *Ruby v. American Airlines*, 329 F.2d 11, 23 (1964) (Friendly, J. dissenting), *East v. Romaine, Inc.*, 518 F.2d 332 (5th Cir. 1975); *United States v. Weingarten*, 473 F.2d 464, 460 (6th Cir. 1973); *Schultz v. American Can*

(Cont'd)

With a few important exceptions,[14] Commerce does not dispute the "facts" found by the Court. Indeed, much of the opinion recites uncontested facts. The issues Commerce raises on appeal principally pose questions of law applicable to virtually admitted fact patterns. Where the District Court erred on these issues was in drawing broad conclusions while omitting[15] finely honed detailed findings of fact which would permit an exhaustive review to ascertain if the Court "clearly erred" on any particular facts. To meet this problem, Commerce promptly moved pursuant to Rule 52(b) to request the Court to make sixty (60) specific additional factual findings (1443-55a). Transcript and/or Exhibit references were provided for each requested finding. The findings were divided into three sections the first two of which dealt exclusively with facts relating to the Court's rejection of Commerce's antitrust claims; and the last of which related to the Court's legal conclusion that "the problem created by the injunction was compounded by the long delay of Commerce and Vantage in seeking an appellate remedy"

(Cont'd)

*Company - Dixie Products*, 424 F.2d 356, 360 (8th Cir. 1970); and *Schultz v. Wheaton Glass Company*, 421 F.2d 250, 267 (3rd Cir. 1970). See also *Texas Company v. R. O'Brien & Co.*, 242 F.2d 526, 529 (1st Cir. 1957) and *Stevenot v. Norberg*, 210 F.2d 615, 619 (9th Cir. 1954).

14. Commerce does contend that the District Court clearly erred in finding (i) that Vantage did not enter into the SoCal Charter until February 8th the day of the Kheel Arbitration (1418a) (Commerce brief, p. 44); and (ii) that the weight of the evidence shows that at least through the end of March, SoCal would have chartered the BARBARA (1423a) (Commerce brief, p. 38).

15. In the District Court, Commerce made essentially the same due process argument against the application of the Injunction Bond limitation as is advanced in this Court. Judge Griesa "omitted" to make factual findings concerning the proceedings before Arbitrator Kheel; "omitted" to mention that Judge Frankel proceeded on numerous erroneous factual premises; "omitted" to determine whether the NMU, intentionally or otherwise, misled Judge Frankel (compare Commerce's Amended Counterclaims paragraph eighteenth, 268a); "omitted" to describe Commerce's efforts to reverse the fact of the injunction before the Labor Board and in the proceedings before Judge Croake; and "omitted" to decide one way or the other, whether the due process argument had a proper legal foundation. District Court determinations which treat serious constitutional questions as "quibbles" (see *supra* n. 10) unworthy of factual description are not protected by Rule 52(a), and legal conclusions based upon an obviously incomplete factual recitation may be reviewed *de novo* by the Court of Appeals.

(1432a). The District Court was expressly invited to make "specific findings, even if contrary" to those proposed by Commerce "to clarify the record for the Court of Appeals" (1458a). The Rule 52(b) motion was denied in its entirety by Judge Griesa (1473a).

In any event, it is clear that Judge Griesa's erroneous conclusions may be corrected by this Court, even if it proceeds under the "clearly erroneous" standard. *United States v. United States Gypsum*, 333 U.S. 364 (1948)[16] ("Gypsum"). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Gypsum*, 333 U.S. at 394-95.

In *Gypsum*, an antitrust case, the trial court made detailed and specific factual findings, which were reversed on appeal. The Supreme Court held:

> "On cross examination most of the witnesses denied that they had acted in concert. . . or that they had agreed to do the things which were in fact done. Where such testimony is in conflict with contemporaneous documents we can give it little weight particularly when the crucial issues involve mixed questions of law and fact." *Gypsum*, 333 U.S. at 395-96.
>
> "In findings 75-79, 99-102, the trial court considered the problem of jobbers. These findings state, in effect, that the license agreements were not executed with the intent of eliminating jobbers . . . . The defendants entered into a common scheme to stabilize the industry, and since the elimination of jobbers was under-

16. The NMU's reliance upon *United States v. Yellow Cab Co.*, 338 U.S. 338, 70 S.Ct. 177 (1949) is misplaced. *Yellow Cab* did not modify what was said in the *Gypsum* case. *Orvis v. Higgins*, 180 F.2d 537 (2d Cir. 1950), *cert. denied* 340 U.S. 810, 71 S.Ct. 37, 95 L.Ed. 595 (1950).

> taken by United States Gypsum in furtherance of that purpose a finding of specific intent as to each licensee is not necessary . . . . The inference we draw from the contradicted evidence is that the defendants acted in concert to eliminate an important class of jobbers." *Gypsum*, 333 U.S. at 377-398.

The learning of *Gypsum* is applicable in this case.

Judge Griesa properly found that the genesis of the NMU's restraint-on-transfer clause was the MEBA/MSC contract amendment of May, 1968 (1407a). The uncontradicted testimony showed that three men had participated in the discussions leading up to the MEBA/MSC contract amendment, one the general counsel for MEBA,[17] one an MSC owner, and the third, Edward Silver, attorney for MSC/TSC. At the time of this litigation, of the three, only Mr. Silver was alive. The testimony further showed that once the MSC agreed to the MEBA restraint-on-transfer clause, it became a "foregone conclusion" that the provision would be extended to the NMU (745a).

In pre-trial discovery, the unions produced virtually no documents[18] whatever relating to the negotiation of the clause. The best evidence Commerce could present on its case in chief was the documents produced by Mr. Silver's law firm and

17. Commerce also sought trial testimony from the President of MEBA, who had answered pre-trial interrogatories with a series of "I don't recall" and "I don't recollect" answers (1306a). Mr. Calhoon, who lives and works in New York, refused to testify unless subpoenaed, and was "too busy" in Washington to return to New York during the two week trial (460-61a; 468-69a; 501-03a).

18. In response to broadly drawn pre-trial document demands, the NMU produced only *one* document in any way relating to negotiation of the restraint-on-transfer clause (E68). Even this document was cropped to block out a critical sentence thereof (994-95a). What inferences may be fairly drawn from the lack of documents? It could mean they were destroyed in a fire (417a). It also could mean, as Commerce believes the evidence compels, that restraint-on-transfer and industry-wide pension funding were agreed to by and between MSC/TSC employers and the unions in their private negotiations before the 1969 industry-wide negotiations even commenced.

clients, and recognizing that it had adverse witnesses (386a) to cross-examine him[19] and the NMU people who participated in the extension of the clause to the NMU.

Although the following proofs are unnecessary to sustain Commerce's *per se* antitrust claims, they are included to demonstrate that Judge Griesa's findings of ultimate facts were "clearly erroneous" on the facts in addition to being "erroneous" on the law.

| The Documents Demonstrated: | The Testimony Was: |
|---|---|
| 1. There were extensive private negotiations between MSC/TSC and the unions prior to the opening of industry-wide negotiations (e.g., E46-57). | Mr. Silver said he "may have had some informal discussions with representatives of the Unions" which he did not "recall" (551a; 597a). |
| 2. MEBA obtained the first restraint-on-transfer clause from the MSC employers in private talks (E22-23). | Mr. Silver termed MEBA Agreement an "addition", not a "modification" (539a). |
| 3. The opening of negotiations was conditioned on MSC/TSC agreeing to restraint-on-transfer for all the unions (E68). | Mr. Silver testified that he had no recollection of discussing a sale and transfer type clause with any representative of the NMU prior to opening of formal negotiations (522a). See also Spector (983-1003a). |

19. After extensive discovery of union witnesses yielded little more than "denials" and "do not recalls", Commerce tactically chose not to depose Mr. Silver. Judge Griesa was critical of and impatient with Commerce's tactic (594-96a; 649a). To the extent that the District Court was confused by this presentation, perhaps Commerce bears the responsibility.

| | |
|---|---|
| 4. The "Miami meetings" held by the unions were held "at the request of the Companies" (Comm. Exh. 40; 599-603a), indeed at the initiation of Mr. Silver (E52). | Mr. Silver denied that the Miami meetings were held at the request of the Companies (599a). *But see* Testimony of Mel Barisic (400-05a). |
| 5. The MSC/TSC employers entered into agreements with the unions which restrained trade by foreclosing sale to those United States flag carriers who would not or could not retain the NMU and its affiliated supervisory unions (E18; E22-23; E31, E39). | Mr. Silver admitted making the agreements, but denied understanding the restraint (544-47a). |
| 6. The documents reflected that the parties had "focused" on the foreign flag exclusion to restraint-on-transfer (e.g. E39). | Mr. Silver denied any conversation concerning it: it was never a consideration (634-35a).[20] |
| 7. The industry-wide pension guarantees were agreed to first by MSC/TSC employers and then imposed by the unions on the independent employers (E25-28; Comm. Exhs. 15, 16; 630-33a).[21] | Mr. Silver admitted the chronology as to the MEBA plan (582-84a), but denied recollection as to whether the same procedure was followed with regard to the NMU (632a). |

20. Commerce *credits* Mr. Silver's testimony: it was *never* a consideration because the whole purpose of the clause was to bind existing United States flag operators, so long as the vessels remained in the coastwide market, to the pension contribution plan. This is so obvious from the clause that it must rationally and reasonably be inferred from the agreements which the parties actually made.

21. In Commerce's view, although this is not entirely clear, the documents also reflect that the MSC/TSC employers urged continuation of the discriminatory 15/25 year pension funding provisions when, because of the industry-wide guarantees, the unions could not possibly have had an interest in continuing such discrimination and when no MSC/TSC employer would have had to contribute at the higher rate (Comm.

| | |
|---|---|
| 8. There were *no* documents showing any continuing negotiations respecting restraint-on-transfer after the economic package was reached. | Mr. Silver and others testified that the negotiations on restraint-on-transfer continued for many months (535-36a). See note 18, *supra.* |
| 9. The restraint-on-transfer clause was directly related to the simultaneously negotiated industry-wide pension pooling agreement (E52).[22] | Mr. Silver denied this (646a). |

It is undisputed that as a consequence of the NMU agreements with the supervisory unions and employer associations two things happened:

1. Per man per day pension rates under the NMU contract alone increased from $7.418 in 1969 to $13.69 in 1972 (1044a) when the NMU *forgave* $5 to $8 Million in deficiencies (641a) and decreased the annual guarantee (1045a).

2. During those three years, marginal employers were forced to transfer their vessels foreign or scrap them, in either event out of the coastwise trade (E69-86; see Proposed Finding 32 at 1449a).

It is hard to find where in its opinion the District Court dealt with this evidence in concluding:

(Cont'd)

Exhs. 41, 42; 620-29a). Mr. Silver testified that this was merely responsive to union demands and that the discrimination was absorbed into the guarantee (Compare E38 with 623-24a, 628a).

22. Until the litigation reached the damage action stage, the NMU consistently maintained that the restaint-on-transfer provisions were "essential to the stability and solvency of the NMU Pension Plan" (E125) negotiated "to limit the impact of the danger" of transfer for operation under United States flag otherwise than by an NMU-contracted party (E138-139) and specifically designed to meet the possibility of a detrimental effect on the Pension Plan (E160).

> "I reject the contention of Commerce and Vantage that the TSC and MSC, as far as any issue in this case is concerned, negotiated improperly for the benefit of the larger companies vis-a-vis the smaller companies such as Commerce" (1413a).

A thorough search of Commerce's Fourth and Fifth Amended Counterclaims (271-276a) in no way reflects the "contention" Judge Griesa rejected.[23] Commerce seriously suggests that in the sixteen months after trial that the matter was *sub judice*, the District Court "forgot" the connectives between the evidence and the allegations, because Judge Griesa substituted the erroneous legal premise urged by the NMU, that the Union's conduct was protected by the umbrella of the labor exemption to the antitrust laws, unless there was a conspiracy between the Union and some employers against other employers. See *Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797, 806-11 (1945). But see *Connell, supra*, at 621-23. See also Vantage brief pp. 17-25.

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23. Judge Griesa also found that "the restraint on transfer clause was a demand by the unions on all the companies, large and small" (1413a). As to the NMU, this is palpably erroneous. *No* such demand or request was ever communicated to Commerce or any other independent: The provisions were simply imposed on them by agreement with the MSC/TSC employers. Ample proof of that is in the record: Asked whether *any* employer had signed *any* written agreement incorporating restraint-on-transfer prior to January, 1971, Mr. Barisic testified he "assumed" there were signed agreements 413a). NMU counsel then led the Court to believe that the "blue book," incorporating restraint-on-transfer, had been transmitted to the independents by writings requesting signature, and that blue books had been signed by a number of companies (415-21a). Counsel, which had not produced any such documents during extensive pre-trial discovery, then "stalled" the Court, obviously hoping to avoid production (455-57a; 487a). Switching tactics, the NMU then contended that the initial writings were destroyed after the blue book was printed up (532a). Judge Griesa found it incredible that the Union did not categorically know whether or not there was a memorandum of understanding executed covering Article I, Section 2 (533a). Mr. Spector, who was in court while all this happened, then finally admitted that "nobody was asked to sign this agreement" until after Article I, Section 2 clause was erroneously upheld as valid by the NLRB trial examiner in September, 1971 (978-81a) when the matter was purportedly brought to his attention *by Mr. Barisic* (1020-21a). Despite this record, Judge Griesa credited Mr. Spector's belated testimony that the failure to get the employers to sign off on restraint-on-transfer was due to "oversight" (1413a). This, too, was "clearly erroneous."

As in *Gypsum*, the evidence *compels* the conclusion that the MSC/TSC employers acted in concert with the NMU in achieving the results which were the natural consequences of the *admitted* agreements "to stabilize the industry." For the foregoing reasons, Commerce submits that Rule 52(a) does not foreclose this Court's *de novo* review of the facts; nor does it preclude remand to the District Court with appropriate instructions with respect to the applicable principles of law to be applied.

## POINT V

## THE NMU'S ADDITIONAL FACTS ARE NOT RELEVANT TO DETERMINATION OF THE APPEAL.

The NMU brief (pp. 2-8) contains a counter statement of the case which purports to set forth "additional facts" relevant to answering appellants' arguments. The Union then lashes into Commerce's counsel for its admitted failure to have become knowledgeable prior to the contract of sale as to the legal complications arising from the restraint-on-transfer clause[24] and for its zeal thereafter in prosecuting this action; and the NMU further seeks to defend Judge Frankel's admittedly erroneous "assumptions" of fact (see Commerce's brief, pp. 13-14, 36-37) by pointing to facts[25] "creating the impression" which led to the

24. This is a very curious argument for the NMU to be making. The testimony in this case proved that the Union secretly negotiated an oral agreement only as to the restraint-on-transfer clause. It then "imposed" the provision on an industry-wide basis by including it in the printed contract without in any way alerting its contracted employers of the provision. Accordingly, restraint-on-transfer received so little publicity in the industry that the impact of the provision was misunderstood by Commerce's special counsel (358a) as well as Vantage's principals and their maritime counsel, and such misunderstanding was intentionally magnified by attempted Union deception of Commerce after the controversy erupted (699-701a).

25. Commerce concedes that certain facts, and the NMU counsel's advocacy thereof, before Judge Frankel, honestly misled *him*. Commerce denies that the NMU was ever misled and indeed alleges that NMU counsel intentionally fooled the Court. For example, NMU counsel represented to Judge Frankel that Mr. Barisic had learned of the proposed transfer of the Vessel through third party sources (1452a). At trial, Mr.

(Cont'd)

erroneous assumptions. As to the last item, Commerce only wishes to point out again that Judge Frankel's order was one of "preliminary" relief. Commerce's brief concedes that on February 23, 1971 Judge Frankel was "faced with a difficult decision" which "had to be forged in a hurry" (Commerce's brief, pp. 36-37). Erroneous assumptions based on misimpressions are understandable in "preliminary" determinations.[26] What Commerce objects to is the NMU's argument "that the damages were caused by the Court's erroneous *preliminary* estimate of the Union's probabilities of success rather than by the Union's overt acts in making and enforcing the illegal agreements" (Commerce's brief, p. 29).

The NMU's point appears to be either that Commerce should be denied relief because of its negligence or that the controversy might have been avoided had Commerce been knowledgeable as to the restraint-on-transfer provision.[27] Neither argument withstands close examination.

Commerce concedes that where a person negligently places himself in the path of an oncoming train, the accidental injuries suffered by that person as a consequence of any unavoidable

(Cont'd)
Barisic denied that, and denied recollection of discussing it with NMU counsel (473-74a). But, the inference of other "sources" creeps back into the NMU's brief on appeal (p. 4). party (138-139)

26. Commerce does not shrink from its assertion that Judge Frankel's one-sided assumptions on contested issues of fact compounded the denial of due process, effectively foreclosing Commerce's appellate remedies (in the absence of NLRB intervention) and coloring all of the proceedings which followed.

27. It is true that the officers of Commerce's parent company — attempting to move with utmost haste to avoid a then impending financial crisis (683-84a) — did not know or learn of the specifics of the restraint-on-transfer provisions. Commerce's special counsel did have general knowledge of the industry and of the conflicting claims of jurisdiction by the maritime unions (376-78a). This knowlege was communicated to Vantage, the proposed buyer of the Vessel. Vantage promised "to take care" of any union problem. Commerce relied upon that promise because it believed that (i) it was none of its business which unions Vantage employed; 29 U.S.C. §158(e); and (ii) it was Vantage's duty as a matter of law to deal with all unions lawfully representing employees engaged in the business it was taking over. See generally *Howard Johnson Co., Inc. v. Detroit Local Exec. Bd.*, 417 U.S. 249, 94 Sup.Ct. 2236 (1974).

occurrence are not remediable in damages. What happened here was not an unavoidable accident. The testimony adduced at trial was akin to proof that the engineer faced with a victim on his track intentionally accelerated and dragged the body along. On February 6, 1971, Commerce offered to make a contribution to the NMU pension funds equal to all of the monies which might be lost by transfer of the BARBARA, and the NMU rejected that offer and stated that there was "no way out" other than to give the NMU the jobs (479-80a; 693-700a). On February 22nd, the NMU rejected Judge Wyatt's wholly reasonable suggestion that the controversy be submitted to the NLRB. On March 29th, the NMU rejected Commerce's proposal to tender the Vessel to Vantage when it was obvious that there was no NMU buyer available (E58-59; 704-06a; 747-49a; 900-11a). The NMU even refused reasonably requested cooperation in arranging a sale to a foreign flag operator (E60-61; 762-65a).

In any event, the mature judgment of Justice Frankfurter seems answer enough to this charge. In holding that an employer may simply ignore all illegal hot cargo clause contained in its collective bargaining agreement, he wrote:

> "This is so because by the employer's intelligent exercise of choice under the impact of a concrete situation when judgment is most responsible, and not merely at the time a collective bargaining agreement is drawn up covering a multitude of subjects, often in general and abstract terms . . . ." *Local 1976 United Bhd. of Carpenters v. N.L.R.B. (Sand Door)*, 357 U.S. 93, 105-06, 78 S. Ct. 1011, 1019 (1958).

Thus, under *Sand Door*, even if Commerce had signed Article I, Section 2 (which it did not), and even if it had been alerted as to its provisions (and it was not), Commerce had the right to exercise intelligent choice when the impact of the clause was made clear in a concrete situation. As Commerce contends in its

§303 action, the decisions of Judge Frankel and Judge Griesa would "reverse" the Supreme Court holding in *Sand Door* by making it the obligation of a party who enters into an illegal "hot cargo" agreement to adhere to it until the employer seeks "a timely test before a court or arbitrator" (1421a).

Nor could the controversy have been so easily avoided. If, on the night of December 22nd, Commerce had refused to sell the BARBARA to Vantage because of Vantage's inability to retain the NMU crew and contract, Commerce would have exposed itself to unlimited liability for violation of law.

Insofar as the admittedly overzealous language employed in Commerce's counsel's affidavit in support of the Rule 52(b) motion (1456-72a), it is clear that it is irrelevant to the issues raised on appeal. This has been a long and difficult litigation and needless vituperation[28] which both sides have engaged in does not do credit to anyone.

Finally, the NMU brief contends that Commerce's counsel's "failure to read and comprehend the collective bargaining agreement" resulted in the breakdown of the Commerce-Vantage negotiations for alternate arrangements to save the SoCal Charter (NMU brief, pp. 6-7). This point is pure diversion unrelated to any issue on appeal. Commerce wishes to point out that it won the commercial arbitration versus Vantage in which the issues to what occurred as between the two commercial parties were fully tried. For this Court's further edification, however, the testimony clearly demonstrates that the proposal

28. A good example of "needless name calling" is the NMU's assertion (NMU brief, p. 5) that Commerce's brief is "absolutely and totally false" when it states that on February 9th the NMU obtained the initial TRO from Judge Wyatt on *ex parte* application. Commerce does not now nor has it ever complained about the procedure employed by Judge Wyatt (1469a), and the NMU knows this. Nonetheless, it is uncontested that on February 9th the NMU went to court without notifying Commerce or the undersigned, known to NMU counsel to be the principal attorney for Commerce. The NMU gave *telephonic* notice to Commerce's special counsel, Mr. Simon. For six years, Mr. Simon has consistently testified that he was not in court other than to pick up the order and that he made no argument before, or other presentation to, Judge Wyatt (366-67a). Thus, it seems clear that the original TRO was obtained on *ex parte* application.

being advanced on March 10, 1971 was that of a new sales contract deferring delivery of title to the Vessel to Vantage until the earlier of a final NLRB ruling on the validity of restraint-on-transfer or the end of the term of the NMU collective bargaining agreement. In this context, Commerce reasonably requested that Vantage's commitment be unconditional so that "if the NLRB upheld restraint-on-transfer" Vantage would assure that the provision was complied with. Failure of Commerce's counsel to have taken that precaution presented risks of contempt of court[29] as well as NMU strikes or other interference to protest the evasion of the clause and Court decree (1101-1104a). Mr. Sovel's offer, first made five years after the events to assure Commerce that there was an "easy out" from the restraint-on-transfer dilemma, makes even more indefensible the Union's total and absolute unwillingness to waive the restraint-on-transfer clause when Commerce literally begged it to do so in February and March of 1971.

This is not an "accident" case, but rather an intentional secondary boycott,[30] illegal under the antitrust and labor laws. The NMU has advanced no reason why under the statutes enacted by Congress, it should be able to shift the economic consequences resulting from its wrongdoing to the victims of the plot.

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29. Judge Frankel's order of March 4th provided that pending the final decision in this case, Commerce was enjoined and restrained from selling or transferring the S/S BARBARA to Vantage without complying with Article I, Section 2 (112a).

30. The NMU brief (p. 6) admits that the Union knew all along that even if the restraint-on-transfer provision was upheld by the courts Vantage "could not so agree" to retain an NMU crew (but see 699-701a). Thus, the NMU's "practical joke" on the courts is exposed: it demanded as a condition of sale receipt of an undertaking known by it to be void and unenforceable.

## CONCLUSION

For all of the foregoing reasons, it is urged that the judgment below be reversed and that the case be remanded to the District Court with appropriate instructions to the Court as to the law to be applied in assessing damages against the NMU.

Respectfully submitted,

s/ D. David Cohen
*Attorney for Defendant-Counterclaimant-Appellant*

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

COMMERCE TANKERS CORPORATION,

Defendant-Appellant,

- against -

NATIONAL MARITIME UNION OF AMERICA,

Plaintiff-Appellee.

*Index No.*

*Affidavit of Personal Service*

*STATE OF NEW YORK, COUNTY OF* NEW YORK *ss.:*

*I,* Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

*That on the* 15th *day of* Sept. *1976 at* 500 Fifth Avenue New York, N.Y.

*deponent served the annexed* reply brief *upon* Surrey, Karasik, Morse & Seham

*the* attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

*Sworn to before me, this* 15th *day of* September *19* 76

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Reuben Shearer

Reuben Shearer